Upper Clark Fork River Basin Steering Committee Meeting Summary October 31, 2007

Introductions

Gerald Mueller and members of the Upper Clark Fork River Basin Steering Committee (Steering Committee) introduced themselves. Those in attendance included:

Members Group/Organization Represented

Senator Dave Lewis Lewis and Clark County and Senate District 42

Jim Dinsmore Granite Conservation District
Marci Sheehan Atlantic Richfield (ARCO)
Bob Benson Clark Fork Coalition

Doug Martin Natural Resource Damage Program (NRDP)

Jules Waber Powell County

Public

Maureen Conner Granite County Commissioner

Staff

Curt Martin Montana Department of Natural Resources and Conservation

(DNRC) Water Resources Division

Gerald Mueller Facilitator

Agenda

• Review summary of the September 19, 2007 Meeting

- Updates
 - Steering Committee letter to the Water Policy Interim Committee
 - October 24 & 25 Water Policy Interim Committee meeting
 - ARCO Water right change application
 - Clark Fork River consent decree
- Water Milltown Dam water right paper
- DNRC Rule Proposals
- Steering Committee Work Plan
- Public Comment
- Next Meeting

September 19, 2007 Meeting Summary

The Steering Committee made no changes to the meeting summary.

Updates

<u>Water Policy Interim Committee (WPIC) Letter</u> - Gerald Mueller reported that on October 4, 2007 he sent a letter from the Steering Committee to the WPIC recommending that it prioritize three issues: exempt wells, water right enforcement, and subdivision permitting. A draft of the letter had been circulated to the Steering Committee for comments. A copy of the letter mailed is attached below as Appendix 1.

October 31, 2007 Upper Clark Fork River Basin Steering Committee Meeting Summary Page 1

Steering Committee Member Comment - DNRC Director Mary Sexton recently spoke at a conference and said that her department is unable to process permits for community wells at a faster rate.

Response by Curt Martin - We are unable to process permits faster because permits are property rights, and other water right holders and interests have a right to be notified of and object to permit applications. The objections trigger a contested case hearing. The contested case hearings are the source of the delay.

Steering Committee Member Question - How long does it take to get a permit? Answer by Curt Martin - The permit hearings are backed up by about a year.

Comment by Gerald Mueller - At the Thompson Falls WPIC meeting, Water Resources Division Administrator John Tubbs expressed an interest in moving water right permit applications earlier in the subdivision process to reduce the delay for developers. The state does not have a policy regarding community versus individual wells and septic systems.

Response by Curt Martin - DNRC has proposed that subdivisions with 10 or more lots be considered a combined appropriation so that a water right permit would be required even if each lot had an individual well.

Steering Committee Member Comment - Lewis and Clark County is amending its subdivision regulations and in attempt to mitigate impacts on senior water rights. It is not clear how this authority will mesh with DNRC's existing permit authority.

Water Policy Interim Committee Meeting - WPIC met on October 24 and 25 in Choteau. Holly Franz attended. Although she was unable to attend today's meeting, she reported to Mr. Mueller that WPIC directed its staff to draft bills on the following six topics. The direction did not provide details of the bill contents. The six draft bills will be discussed at the next WPIC meeting on December 19-20, 2007 in Helena. These dates are a change to the previously announced meeting schedule for a meeting in Hamilton, which will now be held in January 2008. The six bill topics were:

- Expediting the adjudication Ranchers in the Choteau area expressed interest in moving to an enforceable water rights decree, even though all objections filed in response to their temporary preliminary decree have not been addressed.
- "Bucket-for-bucket" mitigation This bill would allow permitting for ground water wells to
 proceed without the hyrdogeologic assessment required by HB 831 if the water withdrawn via
 the well would be replaced by the same amount.
- Requiring a notice of intent to drill a well This requirement would allow people to assess whether a proposed well would be in the plume of a septic system;
- Strengthen enforcement How the strengthening would occur was not clear.
- Provide for local control of water quality permits Again, the details were not specified.
- Montana Department of Transportation (MDT) water reservations MDT asked for a bill that would allow it to pursue reservations in closed basins to provide water for wetland mitigation.

<u>Arco Water Right Change Application</u> - Jules Waber sent to Mr. Mueller a copy of a public notice for a change authorization application number 76G 3001374 filed by ARCO on August 31, 2007. This change is not one of the changes discussed by Mike McLane at the September

19, 2007 Steering Committee meeting. 76G 3001374 involves diversion of up to 6.25 cubic feet per second (cfs) water from Warm Springs Creek that was previously used for irrigation. Under the change, the water would be used for instream flow in Warm Springs Creek and in the reach of the Clark Fork River from the Warm Springs Creek confluence to Gold Creek. Mr. Waber stated that a number of objections to this change have been filed with DNRC. Marci Sheehan said that this change involves Ueland irrigation water, but because ARCO's attorney is on vacation, she could not provide further details at this meeting.

<u>Clark Fork River Consent Decree</u> - Doug Martin reported that the draft consent decree for the Clark Fork River Superfund site is still expected by the end of this year. Release of the consent decree would be followed by a 30-day comment period. After the comments are addressed, the consent decree would be subject to approval by Federal District Court Judge Haddon.

Water Milltown Dam Water Right Paper

The Steering Committee discussed the October 30, 2007 draft of the paper that had been emailed to Steering Committee members prior to this meeting. This draft is included below in Appendix 2. Highlights of comments and questions by Steering Committee members follow.

Steering Committee Member Comment - The information regarding the Milltown Dam storage, a surface area of the reservoir of 500 acres, a maximum depth was 28 feet, and the total storage of 820 acre feet, does not appear to be correct. It seems to imply that the average reservoir depth was only 1.6 feet.

Response by Gerald Mueller - This information came from DNRC Regional Manager Bill Schultz. The Montana Power Company supplied these numbers with its storage water rights claim.

Steering Committee Member Question - How was the value of the Milltown Dam water rights appraised? What use of water is assumed in the appraisal of the water rights? Answer by Gerald Mueller - I don't know. A NorthWestern Energy official told me that the appraisal is not public information.

Steering Committee Member Comment - Perhaps the reason that the appraisal has not been made public is that absent hydropower production the value is very low.

Steering Committee Member Comment - Given the facts that the Water Court has not decided the Milltown storage water right claim is valid and the Consent Decree requires a new government owner to maintain an instream beneficial use, should the section on the possible change to the evaporation "consumptive" portion of the storage right be dropped? Response by Gerald Mueller - The discussion is "outside the box" thinking. Perhaps it is too far outside the box.

Steering Committee Member Comment - Along with the listing of the number, distribution, and purposes of water rights junior to the Milltown priority date, it would be useful to give some specific examples of junior rights. All of the basin's storage rights are junior to December 11, 1904, and so are the Murphy rights.

Response by Gerald Mueller - The Allendale Irrigation Company water rights are also junior. I will ask DNRC to provide me some examples to include in the paper.

October 31, 2007 Upper Clark Fork River Basin Steering Committee Meeting Summary Page 3

Comment by Curt Martin - The discussion of abandonment is not correct. I will supply some language for this section.

Steering Committee Action - The Steering Committee agreed to releasing the paper without further review once the DNRC abandonment language and specific examples of junior water rights are incorporated. The section on the "consumptive" portion of the Milltown storage water right should be left in the paper because the uncertainties regarding it are clearly stated. When these changes are made, the paper should be posted on the Steering Committee web site, http://dnrc.mt.gov/wrd/water_mgmt/clarkfork_steeringcomm/default.asp, and hard copies should be mailed to the basin county commissions, conservation districts, and groups represented by Steering Committee members. Mr. Mueller and Steering Committee members may also present the paper to groups such as the Granite Headwaters Watershed Group.

DNRC Rule Proposals

Curt Martin passed out copies of two recent DNRC water-related rule proposals, one addressing net depletions and the other water right permit objections. See Appendices 2 and 3 for copies of the rule proposals.

<u>Net Depletions</u> - This proposed rule change has been noticed for comments and a hearing on it has been held. The comment period is closed. This rule implements HB 831, passed by the 2007 legislature. It addresses the meaning of adverse effects and what has to be mitigated. The previous requirements for aquifer testing are repealed in favor of the specific requirements in HB 831.

<u>Permit Application Objections</u> - The comment period on this proposed rule change closed on October 12. A hearing will be held on it on November 5, 2007. This rule addresses three topics. It claries when permit filing fees would be refunded, who can file an objection, and requires that with one exception, objectors must be represented by an attorney. The exception is an objector who appears *pro se*, i.e., who represents her or himself.

Steering Committee Work Plan

The Steering Committee agreed to add to the list of work plan topics, consideration of the Clark Fork River consent decree and associated restoration plan.

Public Comment

There was no additional public comment.

Next Meeting

The next meeting is scheduled for Wednesday, January 9, 2008 in Deer Lodge. The agenda will may include discussion of the WPIC bill drafts, and, if it is released, the Clark Fork River settlement agreement and the associated state restoration plan for the River.

Appendix 1 Upper Clark Fork River Basin Steering Committee

C/O Gerald Mueller 440 Evans Missoula, MT 59801 (406)543-0026

October 4, 2007

Senator Jim Elliott Chairman Water Policy Interim Committee C/O Krista Lee Evans Legislative Environmental Policy Office Room 171, State Capitol P.O. Box 201704 Helena MT 59620-1704

Dear Senator Elliott:

I write to you on behalf and at the direction of the Upper Clark Fork River Basin Steering Committee (Steering Committee). A brief synopsis of the Steering Committee's statutory mandate and a list of its current members are enclosed.

At its last meeting, the Water Policy Interim Committee (WPIC) invited comments on the issues that it should prioritize. After reviewing the list of issues prepared by Representative Cohenour, which was sent out by Krista Lee Evans, the Steering Committee proposes that the WPIC focus on exploring three issues:

- Exempt wells The combination of the 35 gallon per minute, 10 acre-feet per year exemption for new wells and existing permit requirements appears in some instances to result in developers using individual wells when community/municipal systems may be a better choice. Exempt wells are also not subject to the adverse effects test required for water rights permits, possibly to the detriment of existing water right holders. While in house domestic water consumptive use may be small, the cumulative effect of many exempt wells used for purposes outside of a house may adversely affect existing users.
- Water right enforcement The WPIC heard at its Thompson Falls meeting that the burden for enforcing water rights falls primarily on individual water right holders through the courts and that the associated costs and delays make enforcement impractical for many. In its February 2006 policy paper entitled "How Will Completion of the Adjudication Affect Water Management in Montana?" the Steering Committee discussed how completion of the adjudication may complicate enforcement even more, as well as options for remedying this situation. A copy of this paper has been supplied to Ms. Evans for distribution to you. The Steering Committee urges WPIC to carefully consider ways to ensure that water rights can and will be enforced.
- Subdivision permitting The Steering Committee is concerned with three aspects of
 subdivision permitting. The first is that water quality and quantity considerations should be
 linked and not addressed separately. Second, better guidelines are needed for data
 compilation, i.e., who collects and evaluates the data that are being accepted in the decisionmaking. The third area is the roles of local governments, the Department of Environmental
 Quality (DEQ), and the Department of Natural Resources and Conservation (DNRC) in the

subdivision permitting process. Local subdivision review would benefit from increased coordination with the DEQ. Montanans want detailed information about storm water, wells, wastewater systems, and water quality and how these issues will be addressed and affect their lifestyles and business. DEQ's technical expertise regarding these issues is not generally available during the local government review process. Also, at your Thompson Falls meeting, John Tubbs suggested that developers should seek water right permits earlier in the subdivision process. The Steering Committee urges WPIC to consider these and other aspects of the subdivision permitting process.

Thank you for the opportunity to contribute ideas to your issue prioritization. As you are learning, Montana faces many critical water related challenges. The Steering Committee appreciates the efforts of you and your fellow WPIC members in delving into them.

Sincerely,

Gerald Mueller Steering Committee Facilitator

The Upper Clark Fork River Basin Steering Committee Legal Mandate

The Steering Committee is one of Montana*s oldest collaborative watershed groups. It was created in 1991pursuant to a state statute, 85-2-338 MCA, which directed it to complete and submit a management plan to the governor and the legislature by December 31, 1994. The plan had to:

- (a) Consider and balance all beneficial uses of the water in the Upper Clark Fork River basin;
- (b) Include a description of the standards applied, the data relied upon, and the methodology used in preparing the plan;
- (c) Contain recommendations regarding the Upper Clark Fork River basin closure as provided in 85₂336;
- (d) Identify and make recommendations regarding the resolution of water related issues in the Upper Clark Fork River basin.

The Steering Committee did complete the plan in December 1994 as required.

In 1995, the legislature expended the Steering Committee mandate and amended 85-2-338 MCA to require it to:

- (a) Review the Upper Clark Fork River basin closure and exceptions no less than every 5 years after April 14, 1995, and make recommendations to the legislature regarding necessary changes;
- (b) Prepare and submit a report evaluating the Upper Clark Fork River basin instream flow pilot program as provided in 85-2-439;
- (c) Prepare and submit a report concerning the relationship between surface water and ground water and the cumulative impacts of ground water withdrawals in each subbasin.
- (d) Provide a forum for all interests to communicate about water issues;
- (e) Provide education about water law and water management issues;
- Identify short-term and long-term water management issues and problems and identify alternatives for resolving them;
- (g) Identify the potential beneficiaries of and a funding mechanism for new and expanded water storage sites;
- (h) Assist in facilitating the resolution of water-related disputes;
- (i) Provide coordination with other basin management and planning efforts;
- (j) Advise government agencies about water management and permitting activities;
- (k) Consult with local governments within the Upper Clark Fork River basin; and
- (l) Report periodically to the legislature.

Current Steering Committee Members

Name Area or Organization Represented **Appointed Entity Bob Benson** Clark Fork-Pend Oreille Coalition **DNRC** Director Stan Bradshaw Trout Unlimited **DNRC** Director Marci Sheehan **ARCO DNRC** Director **Dwight Crawford** Deer Lodge Valley Deer Lodge Conservation District **Bob Bushnell** Lincoln Area Rancher Lewis and Clark Conservation District Jim Dinsmore Hall Rancher **Granite Conservation District** Holly Franz PPL Montana **DNRC** Director Natural Resource Damage Program Carol Fox **DNRC** Director Nate Hall Avista Corporation **DNRC** Director Sen. Dave Lewis Lewis and Clark County Lewis and Clark County Commission North Powell Conservation District **Brent Mannix** Big Blackfoot Rancher Jim C. Quigley Little Blackfoot Rancher **DNRC** Director **DFWP DNRC** Director Pat Saffel Rep. John Sesso Butte/Silver Bow Planner Butte/Silver Bow Commission **Granite County Commission** Jim Struma **Granite County** Mile High Conservation District Dan Ueland Silverbow Rancher Jules Waber **Powell County Commission** Powell County

Superintendent of Schools

Appendix 2

PRELIMINARY DRAFT October 30, 2007

Milltown Dam Water Right Paper

Introduction

As a part of the Clark Fork River Superfund remediation, the Milltown Dam power house and spillway are scheduled to be removed in 2007 and 2008, respectively. Associated with this dam are hydropower water right claims to both store water and generate electricity. The removal of the dam will mean that the purpose of the existing rights will cease to exist. Because the hydropower right is large with a relatively old priority date, its fate is important to many upper Clark Fork River basin water users. The Upper Clark Fork River Basin Steering Committee. (Steering Committee) has written this paper to identify and explore alternatives regarding the purpose and ownership of the existing water rights and the implications of the alternatives for upper basin water users.

Deleted: (Steering Committee)

This paper begins by summarizing Montana water law relevant to the Milltown Dam water rights. It details those rights and discusses how they may be affected by the Milltown Dam Consent Decree. It then identifies alternatives for changes to the Milltown Dam water rights. Next, the paper sets forth the river hydrograph above Missoula, the basin water budget, and the number of water rights junior to the Milltown Dam rights by subbasin. Finally, it discusses how the most likely water right change alternatives might be managed and enforced so that basin users can consider how they may be affected by them.

Deleted: and

Deleted: balance

Montana Water Law

Montana's Constitution establishes the basis for allocating water in the state. Article 9, section 3, paragraphs (3) and (4) of the Constitution provide:

- (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.
- (4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present

¹ US EPA Montana Office, Milltown Reservoir Sediments Superfund Site Weekly Update, Issue #26, August 2, 2007.

² The upper Clark Fork River basin is defined in state statues as that portion of the Clark Fork River basin above the confluence of the Blackfoot and Clark Fork Rivers.

³ The Steering Committee is a watershed group formed in 1991 pursuant to a 1991 Montana statute. Its members include six people appointed by the upper Clark Fork basin's (the area of the Clark Fork River basin above Milltown Dam) six counties, six appointed by the basin's six conservation districts, and ten appointed by the DNRC Director to ensure representation of a balance of basin water interests. The Steering Committee's 1991 statutory mandate included drafting a water management plan for the basin which it completed in December 1994. In 1995, the mandate was changed to include implementing and revising the initial plan. See §85-2-338 MCA and *The Upper Clark Fork River Basin Water Management Plan*.

Preliminary Draft October 30, 2007

system of local records.

Thus while ownership of water remains with the state, Montanans can acquire a water right pursuant to state law authorizing them to appropriate water for a beneficial use. The legal framework for water rights is the prior appropriation doctrine which is based on two general rules summarized by the phrases "first in time, first in right" and "use it or lose it".

"First in time, first in right" determines who may use water. Each water right has a priority date which is the date on which the water was first put to beneficial use. The earlier the priority date, the better the water right. A senior water right holder with an earlier priority date is entitled to use the full amount of his or her water right before any junior water right holder can use any water. In times of shortage, the senior user whose right is "first in time" can place a "call" on water to junior users and take all of the available water until his or her right is filled without sharing it with other users.

"Use it or lose it" refers to the requirement that water must be used beneficially or can eventually be alleged to have been lost (abandoned). This requirement is relevant to the Milltown Dam water rights because the dam will be removed and not replaced. Unless the existing rights are changed to a new beneficial use, they will be void. State law provides that a use qualifies as a beneficial use if it falls within one of four categories.⁴:

- Water used for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;
- Water appropriated by the Montana Department of Natural Resources and Conservation (DNRC) under the state water leasing program;
- Water used by the Montana Department of Fish, Wildlife and Parks (DFWP) pursuant to a water right lease; or
- Water used through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource.

Prior to enactment of the 1973 Montana Water Use Act (Act), a water right could be acquired simply by diverting water and putting it to a beneficial use. Since passage of the Act, a new water right or a change to an existing right requires either a permit or an authorization for a change in appropriation right, respectively, from DNRC. A change authorization must be obtained if a change is made to the point of diversion, place of use, purpose of use, or place of storage. If the Milltown Dam rights are kept alive, they must go through the change process.

To obtain a change, the owner of a water right must file an application with DNRC and demonstrate⁵ compliance with the following criteria:

⁵ The applicant must prove by a preponderance of the evidence that the criteria for issuance of an authorization are met. See *Water Rights in Montana*, page 21, February 2006, published by jointly by DNRC, the Legislative Environmental Quality Council, and the Montana University System Water Center. This publication is available via the internet at http://dnrc.mt.gov/wrd/water-rts/wr-general-info/waterrights in montana.pdf.

Deleted: :

Deleted:

⁴ §85-2-102 MCA.

PRELIMINARY DRAFT October 30, 2007

- The proposed use will not adversely affect the use of other water rights or other planned developments for which a permit or certificate has been issued or water has been reserved.
- The proposed means of diversion, construction, and operation of the appropriation works are adequate.
- The proposed use of the water is a beneficial use.
- The applicant owns or has permission from the person who owns the property where the water is to be used. 6

If a valid objection to the change application pertaining to water quality is received, the applicant must also prove one of the following.

- The water quality of an appropriator will not be adversely affected.
- The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, MCA.

In addition, if a proposed change in purpose or place of use for a diversion would result in 4,000 or more acre-feet and 5.5 or more cubic feet per second (cfs) of water being consumed, the applicant must prove the criteria in section §85-2-402(5), MCA. If the change involves the transport of water out of state, the applicant must prove the criteria listed in section §85-2-402(6), MCA, and obtain legislative approval.⁷

It is important to note that changing a water right's point of diversion, place of use, purpose of use, or place of storage, does not change its priority date.

Because prior to 1973 water rights did not have to be filed with the state, no centralized records of Montana water rights existed when the 1972 Constitution was adopted. In response to the Constitutional mandate, the 1973 Water Use Act established a centralized record system for water rights and required that all water rights existing prior to July 1, 1973 must be finalized, documented and quantified through statewide water rights adjudication in state courts. This adjudication is on-going. The Milltown Dam water rights have not yet been quantified by the Montana Water Court.

* *Ibid*, pages 21-22

⁶ *Ibid*, pages 21-22.

⁷ *Ibid*, page 21. The additional criterion in §85-2-402(4) is that the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

the existing demands on the state water supply, as well as projected demands for water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

⁽ii) the benefits to the applicant and the state;

⁽iii) the effects on the quantity and quality of water for existing uses in the source of supply;

⁽iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

⁽v) the effects on private property rights by any creation of or contribution to saline seep; and

⁽vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

PRELIMINARY DRAFT October 30, 2007

Milltown Dam Water Rights

Existing Water Rights

When Montana Power Company (MPC) owned Milltown Dam, it filed two water right claims associated with the dam, one for power generation and one for storage. The DNRC abstract for claim 76M 94404-00 includes the following information:

- Purpose of the water right power generation
- Maximum flow rate 2,000 cfs
- Maximum volume 1,451,556.00 acre-feet
- Period of use January 1 through December 31

Corporation (NWC) acquired the dam from MPC.

• Priority date - December 11, 1904.

This water right was included in a temporary preliminary decree issued for the Middle Clark Fork Basin (76M) in 1984. However, as noted on the abstract, the Montana Water Court will not take final action on this water right claim until final decrees are issued in all three basins involving the dam, the upper and middle Clark Fork River basins (76G and 76M) and the Blackfoot River basin (76F). The Milltown hydro power claim continues to be subject to objection in each basin. The abstract also notes that the power generation use "...may consume some water, but until that amount is quantified, it is presumed that the use is non-consumptive." DNRC received a notice of change in the claim's ownership on June 2, 2005 after NorthWestern

Deleted: G

Deleted:

Deleted: i

Deleted: is

Deleted: i

Deleted: above

Deleted: M

The second claim, 76M 94405-00, is for storage. The priority date, period of use and the point of diversion and its location are the same as for the power generation claim. MPC claimed a flow rate of 940 cfs up to the amount necessary to fill the storage reservoir at any time. Information submitted by MPC with the claim indicates the surface area of the reservoir was 500 acres, the maximum depth was 28 feet, and the total storage was 820 acre feet. The DNRC abstract for the Milltown storage right claim includes two remarks:

Formatted: Right: -4.5 pt, Tabs: Not at 468 pt

- The water court finds no legal basis for this purpose to be considered a beneficial use or an appropriation of water.
- On June 7, 1985 the Montana Power Company filed late objections to the purpose of right and "other". These will be heard after proper notice on the next objection list.

The first remark reflects the fact that the Water Court has not determined whether storing water constitutes a beneficial use. The 1984 temporary preliminary decree for 76M did not recognize the storage claim, and MPC objected to it. The status of storage associated with hydro power is an unresolved issue for dams in both the Clark Fork and Missouri River basins. However, in a 1986 decree, Montana Water Judge Holter upheld storage rights associated with the Thompson Falls hydro power facility. As was the case with the hydropower right, DNRC received a notice of change in the claim's ownership on June 2, 2005 after NWC acquired the dam.

Formatted: Tabs: 13.5 pt, Left

Deleted: ,

Deleted: unresloved

Deleted: ¶

Consent Decree Obligations

NWC has obligations related to its Milltown water rights under the Consent Decree filed to settle

PRELIMINARY DRAFT

⁸ General Abstract 76M 94404-00, which is available from the DNRC Water Rights Bureau.

¹ The DNRC General Abstract 76M 94405-00 does not list a purpose or a maximum flow rate or maximum volume for this right.

October 30, 2007

Superfund litigation related to the Milltown Reservoir/Clark Fork River NPL Site. ¹⁰ In settlement of the natural resource damages claims against it, NWC has an outstanding obligation to the pay the State of Montana (State) \$1.4 million. Pursuant to the Consent Decree, it can meet this obligation in one of two ways.

One way is to use some or all of three funding sources; an insurance policy and the sale of its Milltown Dam lands and water rights. After using the insurance policy proceeds, NWC must appraise and attempt to sell on the open market and at fair market value first the Milltown lands and then the water rights until its \$1.4 million obligation is met. The State has the right to approve of any sale of the lands and the water rights. NWC must offer any unsold portion of the water rights to the State no later than September 2008. The State then has one year following the completion of Remedial Action or 1290 days after February 8, 2006, whichever is later, to accept the water rights. If the State does not accept the water rights, then NWC must offer them to the United States and the Confederated Salish and Kootenai. These other parties would then have one year from the date of the offer to accept it in whole or part. Any governmental entity accepting the water rights must guarantee that the rights will not be changed to a consumptive use. As of August 2007, NWC had completed but not made public an appraisal of the Milltown Dam water rights.

The second way to meet the \$1.4 million obligation is for the State to acquire NWC's land and water rights at Milltown prior to their sale. After the dam is removed and the State receives the insurance proceeds, the State may exercise an option to acquire those land and water. In this event, NWC would receive full credit in the amount of the remaining balance of the \$1.4 million obligation and this obligation shall be considered to be fully satisfied.

Milltown Dam Water Right Change Alternatives

The Steering Committee has identified several alternatives for changes to the Milltown Dam water rights, including abandonment, withdrawal, transfer to a downstream hydropower facility, transfer to new consumptive or instream use, and/or transfer of ownership to a new private entity and/or the State or the <u>United States and the</u> Confederated Salish and Kootenai Tribes, <u>Each of</u> these alternatives will now be discussed.

Abandonment

The 2006 edition of *Water Rights in Montana* defines abandonment as the "...intentional, prolonged nonuse of a water right, resulting in its loss." Precisely when the abandonment occurs is not clear. A Montana statute, §85-2-404 MCA, reads in part:

Abandonment of appropriation right. (1) If an appropriator ceases to use all or a part of an PRELIMINARY DRAFT

Deleted: I

Deleted: must do so using

Deleted: ,

Deleted: and

Deleted: it

Deleted: to meet the \$1.4 million obligation

Deleted: 365 days

Deleted: Tribes and the Department of

Deleted: it

Deleted: Which ever

Deleted: s

Deleted: y

Formatted: Indent: First line: 0 pt

Deleted: As an alternative to the sale of NWC's

Deleted: to satisfy

Deleted: the \$1.4 million obligation, a

Deleted: rights prior to any sales

Deleted: ¶

Deleted: and the Department of the

¹⁰ Consent Decree for the Milltown Site, United States of America vs. Atlantic Richfield Company (ARCO) and Northwestern Corporation (NWC), Civil Action No. CV89-039-BU-SHE, United States District Court for the District of Montana Butte Division. The parties to the consent decree include: ARCO, NWC, the United States, the State of Montana, and the Confederated Salish and Kootenai Tribes.
² The expected value of an insurance premium refund which would be transferred to the State is about \$400,000.

³ NRD Program Fact Sheet entitled "Northwestern's Compensation For Natural Resource Damages At The Milltown Site."

⁴ Water Rights in Montana, page 39, February 2006.

October 30, 2007

- appropriation right with the intention of wholly or partially abandoning the right or if the appropriator ceases using the appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions, the appropriation right is, to that extent, considered abandoned and must immediately expire.
 - (2) If an appropriator ceases to use all or part of an appropriation right or ceases using the appropriation right according to its terms and conditions for a period of 10 successive years and there was water available for use, there is a prima facie presumption that the appropriator has abandoned the right for the part not used...
 - (5) Subsections (1) and (2) do not apply to existing rights until they have been finally determined in accordance with part 2 of this chapter (i.e. the state-wide water rights adjudication by the Montana Court).

Since the adjudication of the Milltown Dam water rights is not final, the above statute does not apply.

<u>Former DNRC Chief Legal Council Donald</u> MacIntyre has reviewed the court decisions regarding abandonment. He concludes:

One clear conclusion to be drawn from the more recent abandonment cases is that in Montana, once an objector establishes a long period of nonuse, the burden shifts to the appropriator to give a reason for the nonuse. A long period of nonuse is established by a showing of 23 years of nonuse...§85-2-404, concerning the prima facie proof of abandonment after ten years once the adjudication is completed, may lead to the conclusion that any nonuse for ten or more years will meet the standard for shifting the burden of proof.⁵

It appears obvious, however, that if the Dam is removed and the owner has no intention to rebuild it, at some point the dam water rights will be abandoned. As explained above, under the provisions of the Milltown Site Consent Decree, the present owner, NWC, must either transfer the rights to the State or attempt to sell at least a portion of the rights to a private party and then offer any unsold rights first to the State and then to the United States and the Confederated Salish and Kootenai Tribes. Abandonment could occur in this case only if no entity either purchases or accepts transfer of the water rights.

Deleted: then

Deleted: State of Montana

Deleted: or

Deleted: Tribes.

Withdrawal

The owner of a water right can voluntarily withdraw it. In theory, since they have not been finally adjudicated, the current owner could simply withdraw its water right claims. However, as explained above, the Milltown Site Consent Decree commits the company to either sell the Milltown Dam water rights on the open market and/or offer them to the State of Montana or the United States or the Confederated Salish and Kootenai Tribes. Withdrawal of the Milltown Dam water rights is, therefore, not an option.

Deleted:, Clark Fork and Blackfoot, L.L.C., a NWC affiliate,

Deleted: Tribes

Transfer to a Downstream Hydropower Facility

The <u>Consent Decree</u> would, under certain conditions, allow NWC to sell at least a portion of the Milltown Dam water rights to a downstream hydropower utility. To transfer the Milltown Dam

Deleted: bankruptcy stipulation

⁵ Don MacIntyre, unpublished memorandum dated August 23, 2007

⁶ The two hydropower utilities owning facilities on the Clark Fork River downstream of Milltown Dam are PPL Montana, which owns the Thompson Falls Dam, and Avista, which owns the Noxon Rapids project.

PRELIMINARY DRAFT October 30, 2007

00.000.00, =00.		
to a downstream dam, the new owner would have to apply for a change authorization from	Deleted: p	ermit
DNRC and demonstrate compliance with the criteria listed on page 3 above. The first criterion		
that must be satisfied is no adverse effects on any existing water right holder. Because of the		
transfer, any water user located between Milltown Dam and the downstream hydropower facility	Deleted: A	
with a right junior to December 11, 1904 would be subject to a water rights call by the new		
owner. A call would adversely affect these junior users. Given this fact, unless arrangements	Deleted:	
would be made to prevent such a call, transfer of the Milltown Dam water rights to a		
downstream hydropower facility appears unlikely. No owner of a downstream hydropower		
facility has publicly expressed interest in purchasing the Milltown rights.		
Transfer to New Consumptive or Instream Use by NWC		
Because of the Consent Decree, NWE cannot retain ownership of the Milltown Dam water rights	Deleted: b	ankruptcy stipulation
and seek a change to a consumptive or instream use. The Consent Decree requires NWC to	Deleted: s	ipulation
transfer the rights to the State or attempt to sell some portion of the right to a new entity and offer		·
any unsold water rights first to the State and then to the <u>United States and</u> Confederated Salish	Deleted: o	f Montana
and Kootenai. This alternative therefore is not applicable to the Milltown Dam rights.	Deleted:	Tribes and the Department of
·	the Interior	
<u>Transfer of Ownership</u>		
The final change alternative would be a transfer of the Milltown Dam water rights to a new		
owner for a new use, perhaps at a new location. Because of the Consent Decree, this is the most	Deleted: S	uperfund
likely alternative to occur. NWC must either transfer all of the water rights to the State, or		<u>·</u>
attempt to sell a portion of the water rights on the open market and offer any unsold rights to the		
State and then the United States and the Confederated Salish and Kootenai Tribes.		
If a private party purchases some portion of the water rights, it would have to obtain an		
authorization from DNRC to change the rights to a new consumptive or instream use. Because of	Deleted: 1	permit
the no adverse effects test, a change of the hydro power right to a consumptive use does not		
appear feasible. The purchaser might successfully change the purpose of the right to a new		
instream flow right with a fish or recreation beneficial use. However, the entire existing right,		
2,000 cfs and 1,451,556 acre-feet, may not be necessary to beneficially support the new purpose.	Deleted: .0	10
If it is not, a portion of the existing hydro power right may not transfer to the new owner and	Dolotou.	
would be lost.		
would be lost.		
The situation would be similar if the State, United States, or the Confederated Salish and		
Kootenai Tribes assumes ownership of all or a portion of the Milltown hydro power right. In this	Deleted: ,	
case, the Milltown Dam Consent Decree expressly forbids transfer of the right to a consumptive	Deleteu.,	
use. A new governmental owner would also have to obtain a DNRC authorization for a change of	Deleted: p	armit .
	Deleted: p	ermit
use for a new instream purpose which would require demonstrating <u>first</u> that the change would not adversely affect any existing water rights and second the amount of water that would be put to		
not adversely affect any existing water rights and second the amount of water that would be put to	Doloto di 1	10
the new beneficial use. Again, one cannot assume that the entire 2,000 cfs and 1,451,556 acre-	Deleted: .0	JU
feet right would transfer to the governmental entity. If, for example, the State would take		
ownership of all or a portion of the hydro power right, in the change process it would have to	Deleted: ,	

PRELIMINARY DRAFT October 30, 2007

demonstrate how much of the existing right would be put to a beneficial use for fish or recreation

or another instream use.

The situation is not as clear for the Milltown Dam storage water right. As stated above, the Montana Water Court has not decided if storage constitutes a beneficial use. However, assuming that the storage right at Milltown exists, it would include a consumptive portion due to evaporation from the reservoir surface. Information submitted by MPC with its Milltown Dam water rights claim lists the surface area of the reservoir at 500 acres. Assuming 3.2 acre-feet per year of evaporation per acre of reservoir surface, ⁷ the Milltown reservoir would evaporate 1,600 acre-feet per year. Should either a private party or the State or another governmental entity take ownership of the storage right, it would appear, therefore, to include a consumptive right of 1,600 acre-feet per year. Removing the dam and eliminating the reservoir would make available for a new consumptive use the 1,600 acre-feet of water per year, the amount that would have been otherwise lost through evaporation. Because the 1,600 acre-feet is in effect "new water," the new water right owner may be able convert the place of use for consumption of this amount of water to a location upstream of the former Milltown Dam without adversely affecting existing water rights. This alternative will be discussed further in the section on enforcement and management alternatives.

Deleted: of

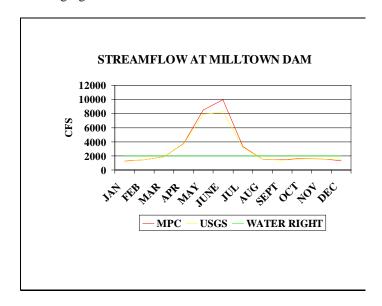
Deleted: ¶

Upper Clark Fork River Hydrograph and Basin Water Budget

Before considering how an instream flow right replacing the Milltown Dam water rights might affect water users upstream, the river hydrograph above Missoula and the major contributors to the flow of the Clark Fork River at Milltown Dam will be identified.

River Hydrograph

The hydrograph showing the average annual flow of the Clark Fork River <u>from 1930 to 2006</u> is shown in the following figure.



Preliminary Draft October 30, 2007

The figure shows that on the average the river above Missoula flows above 2,000 cfs, the level of the power generation water right claim, the last ten days of March, all of April, May and June, and

⁷ Claim No. 76M-w-094404-00 questionnaire for power generation claims.

all but the last four days of July, a total of 130 days per year. Thus, on the average, the Milltown Dam power generation water right is not filled 235 days per year.

Upper Basin Water Budget

The upper Clark Fork River from its beginning below the Warm Spring ponds to the Milltown Dam site has four major tributaries, the Little Blackfoot River, Flint Creek, Rock Creek, and the Blackfoot River. Table 1 lists the annual discharge of each of these tributaries to the Clark Fork, as well as that of the Clark Fork River above its confluence with the Little Blackfoot at Garrison. The source of the Table 1 data is the USGS Water Data for Montana which is available via the internet at http://waterdata.usgs.gov/mt/nwis/annual/.

Table 1 - Upper Clark Fork River Basin Stream Flows

Deleted: --

-Page Break

USGS Guage Locaton	USGS Site Number	Average Annual Discharge (cfs)	Years of Data	Contribution to the Clark Fork Above Missoula Flow
Clark Fork Above Missoula	12340500	2946	1930-2006	
Blackfoot River Near Bonner	12340000	1,555	1940-2006	52 %
Rock Creek Near Clinton	12334510	510	1973-2006	17%
Flint Creek Near Drummond	12331500	118	1991-2002, 2004	4%
Clark Fork River Near Drummond	12331800	673	1994-2006	22%

As indicated in Table 1, on an average annual basis, 52% of the flow of the Clark Fork River measured at the USGS gauge above Missoula is contributed by the Blackfoot River, 17% by Rock Creek, 4% by Flint Creek, and 22% by that portion of the Clark Fork River above the USGS gauge near Drummond. However, under Montana water law, the obligation to support an instream flow right that would replace the Milltown Dam hydro power right would not be apportioned based on the average annual discharge of the river's tributaries. Instead, the obligation would fall on water rights junior to the instream flow water right, i.e. December 11, 1904. The next section of this paper identifies the number and location of water rights above Milltown Dam that have a priority date after December 11, 1904.

Junior Water Rights above Milltown Dam

According to the DNRC water rights data base, 12,650 water rights located above Milltown Dam

17

Preliminary Draft October 30, 2007

have priority dates junior to December 11, 1904. All of these rights have not been decreed, and none are included in final decrees. The status of most rights is listed in the data base as "statement of claim." Of the total junior rights, 3,938 are for surface water. The break down of these rights by sub-basin is shown in Table 2. Table 3 lists the junior surface rights by purpose of use. The purpose with the largest number of rights is stock water, followed closely by irrigation.

Formatted: Right: -4.5 pt

Deleted: se

Deleted: ¶

Table 2 - Distribution of Junior Water Rights by Subbasin

Subbaisn	All Junior Rights	Junior Surface Rights
Rock Creek	667	320
Blackfoot	4,595	2,058
Flint Creek	1,810	329
Upper Basin/Mainstem	6,156	1,310

Table 3 - Surface Water Rights Junior to December 11, 1904 Located Above Milltown Dam

Listed by Purpose of Use

Page Break
Formatted: Left

Number of Rights	Purposes of Use
7	Augmentation, irrigation
17	Commercial
1	Domestic, fish & wildlife, & lawn & garden
1	Domestic, fish & wildlife, & power generation
1	Domestic & industrial
1	Domestic, irrigation, & stock
12	Domestic & irrigation
1	Domestic, lawn & garden, & stock
9	Domestic & lawn & garden
1	Domestic & other purpose
1	Domestic & recreation
1	Domestic & stock
372	Domestic
12	Fire protection
1	Fish & wildlife & fish raceways
1	Fish & wildlife, irrigation, & recreation

⁸ Letter from Curt Martin to Gerald Mueller, August 31, 2007.

1	Fish & wildlife, irrigation, & stock
1	Fish & wildlife & irrigation
1	Fish & wildlife, lawn & garden, & stock
1	Fish & wildlife & mining
1	Fish & wildlife & power generation
1	Fish & wildlife & recreation
3	Fish & wildlife & stock
131	Fish & wildlife
1	Fish raceways & fishery
3	Fish raceways
2	Fishery, industrial, & irrigation
1	Fishery & industrial
1	Fishery, irrigation, & stock
4	Fishery & irrigation
1	Fishery & other purpose
4	Fishery
20	Industrial
9	Institutional
1	Irrigation & other purpose
1	Irrigation, recreation, & stock
2	Irrigation & recreation
16	Irrigation & stock
1	Irrigation, wildlife, & waterfowl
1278	Irrigation
1	Lawn & garden & multiple domestic
1	Lawn & garden & other purpose
3	Lawn & garden & stock
31	Lawn & garden
1	Mining, wildlife, & waterfowl
117	Mining

Formatted Table

133	Multiple domestic
4	Municipal
2	Observation & testing
1	Other purpose
5	Pollution abatement
9	Power generation
2	Recreation & stock
82	Recreation
1	Sale
2	Stock, wildlife, & waterfowl
1456	Stock
4	Storage
1	Unknown
153	Wildlife
5	Wildlife & waterfowl
3938	Total

Deleted: ¶

Formatted Table

Changed Milltown Water Right Enforcement and Management Alternatives

As discussed above, some portion of the Milltown Dam right may, with the approval of the State, be sold to a private party. A more likely outcome is that the rights will be transferred to the State, or if the State declines them, to the United States or the Confederated Salish and Kootenai Tribes. If a new owner obtains a change of the water rights to a new purpose how might they be enforced and/or managed?

Enforcement of the Changed Water Right

To date, past owners of the Milltown Dam rights, MPC and NWC, have not acted to enforce their rights either by making call on junior users when the right was not filled or by objecting to new permit or change applications. Steering Committee members have wondered if ninety-six years of non-enforcement have rendered the rights unenforceable. This does not appear to be the case. Non-enforcement is not the same thing as non-use. Until the recent removal of the hydropower generators, the Milltown rights were used to generate electricity. As discussed above, the rights have not been and, pursuant to the Superfund Consent Decree, may not be abandoned by their current owner. Apparently, no court cases have found that a prolonged period of non-enforcement renders water rights unenforceable.

After the adjudication is completed, and all water rights above Milltown Dam are decreed, enforcing the rights through a call on junior users may be easier than today. Information on all upstream junior rights, e.g. flows and volumes, place of diversion, type of use, etc., will be PRELIMINARY DRAFT

Formatted: Underline
Formatted: Underline
Formatted: Right: -18 pt

October 30, 2007

finalized and the relationship among the rights will be determined and integrated into one decree. • - - - Formatted: Right: -18 pt This information and integration may facilitate the call process.

A new owner of changed Milltown Dam water rights may, therefore, opt to enforce the rights the traditional way, through calls on juniors and by objecting to new permit or change applications. Any call on a junior user above Milltown would be subject to a futile call defense. If a junior user could demonstrate that his or her water would not reach the location of the new Milltown instream flow right, he or she would not need to comply with the call. For example, if the stream goes dry before reaching the senior right holder's place of use, the call would be futile. The fact that the effect of a particular junior use would not be measurable at the senior's place of use is not an adequate defense, however. Because the change process may reduce the flow and volume of the rights, one cannot now predict the frequency of potential calls, but assuming the river's hydrograph does not change, calls would be more likely outside of the period when river flows are normally at their highest, mid-March to mid-July.

Formatted: Font: 12 pt

Formatted: Font: 12 pt

Almost all water rights are enforced based on one value of flow and, when volume caps are specified, one volume value at one location during a specified period of use. Flow values specified relate to peak historic use. For example, the Milltown Dam hydropower right is for 2,000 cfs year round, regardless of the river hydrograph. In other words, NWC could presumably enforce its rights by issuing calls on junior users anytime the flow at the Milltown turbines was less than 2,000 cfs, even if the flow in the river would normally be less than this value. Instream flow rights owned by the DFWP are different. The flow amounts of these rights, known as Murphy rights, can vary throughout the year at the same location. When the State or another new owner of the Milltown water rights seeks a change of use authorization to an instream flow other than power generation, DNRC would have significant latitude to condition the change. One such condition might tie the flow of the water right to the river hydrograph in a manner similar to Murphy Rights. However, from the perspective of an irrigator, the critical enforcement period will probably remain the late summer period when river flows are normally the lowest.

Management of the Changed Water Right

As has been the case with the existing Milltown Dam water rights, the right to enforce does not necessarily translate into actual enforcement. If the Milltown Dam rights are transferred to the State or another owner for an instream flow use, the new owner may opt not to enforce the rights through water rights calls on junior users in return for a consideration such as a drought plan that shares any shortage equitably throughout the basin.

DFWP owns Murphy Rights on the mainstem of the Blackfoot River. It also participates in a voluntary drought plan on the Blackfoot River. The plan includes voluntary action by water users to reduce their use when river flows fall below certain trigger values. As a part of the plan, DFWP has agreed not to issue calls on users with rights junior to the Murphy rights if they comply with the drought plan. The Blackfoot Murphy rights and drought plan might serve as a PRELIMINARY DRAFT

Formatted: Font: 11 pt

Formatted: Right: -18 pt

Formatted: Font: 11 pt

⁹ The new owner of the Milltown water rights would not be precluded from enforcing the changed water right by the change adverse affect criterion because existing users were subject to a call under the hydropower and storage rights.

¹⁰ See the Clark Fork Basin Watershed Management Plan, page 75, September 2004,

¹¹Private communication from Bill Schultz, October 9, 2007.

model for managing a Milltown water right changed to an instream flow.

Applying this model to the upper Clark Fork basin, a drought plan would be developed involving some or all of the six sub-basins above Milltown Dam, i.e. the lower Clark Fork mainstem, the Blackfoot River, Rock Creek, Flint Creek, the Little Blackfoot, and the upper Clark Fork mainstem and tributaries. The drought plan would presumably be triggered when the flow of the Clark Fork River flow falls below the changed Milltown instream flow water right. The drought plan could include a target flow for each of the six sub-basins. If the actual flow into the Clark Fork from the sub-basin was less than its target, then under the drought plan sub-basin water users would have to act to increase the flow to the target level. Each sub-basin would develop its own plan for meeting the target flow. The plan might involve a series of voluntary steps as is the case in the Blackfoot drought plan, or it might involve appointing one or more water commissioners to administer cutbacks consistent with existing water right priority dates.

One way to set the target flows would use sub-basin production targets and the average hydrograph at the Milltown Dam site. Sub-basin production targets might be set at the annual percentage contribution to the flow of the Clark Fork River above Missoula. See Table 1 above. This percentage could then be multiplied by the average flow of the Clark Fork River above Missoula over a specified period to determine a sub-basin target flow. Consider an example for the Blackfoot sub-basin using a daily average hydrograph. According to Table 1 data, the Blackfoot contributes 52% of the average annual flow of Clark Fork River above Missoula. Assume that the average daily flow on August 31 at Milltown is 1,130 cfs and that this flow is less than the changed Milltown water right so that the drought plan would be triggered. On August 31, the Blackfoot would then have a responsibility to produce 52% of 1,130 cfs at its mouth, or 760 cfs. If the actual flow from the Blackfoot into the Clark Fork River was less than 760 cfs, sub-basin water users would implement their plan for cutting back usage until the 760 flow would be met.

Under this management approach, the shortage of flow would be shared between the Milltown water right owner and upstream water users because the drought plan would be designed to produce the sum of sub-basin target flows instead of the changed Milltown water right flow. ¹³ Sub-basin water users would have the flexibility to decide themselves on the actions necessary to meet the target flow. The new Milltown water right owner could opt to enforce its rights through calls on junior users in any sub-basin not participating in the drought plan.

Management of the Consumptive Right

As discussed above, the existing Milltown storage right, if found to be valid by the Montana Water Court, may provide a source of water for new consumptive uses. Because the reservoir caused evaporation losses and removal of the reservoir eliminates these losses, the new instream flow water right holder may be able to consume up to the total evaporation loss, estimated above

Preliminary Draft October 30, 2007

¹² The lower Clark Fork mainstem would include all of the area that drains the Clark Fork mainstem between the mouths of the Little Blackfoot and Blackfoot Rivers, exclusive of Rock and Flint Creeks. The upper Clark Fork mainstem and tributaries includes the area drained by the Clark Fork mainstem above the confluence of the Little Blackfoot River.

Formatted: Font: Not Bold

Formatted: Right: -18 pt

Formatted: Font: Not Bold

Formatted: Font: Not Bold

Formatted: Font: 12 pt

Formatted: Font: 11 pt

¹³ This approach would be equivalent to setting the Milltown right at the average hydrograph if flows dropped below some value.

at 1,600 acre-feet per year, without adversely affecting other water users. One use of this
consumptive water right might be for mitigation water required by HB 831 passed by the 2007
Montana legislature. Under this bill, if a new ground water use in a closed basin would result in a
net depletion of surface water that adversely affects existing surface water rights, then the ground
water user would have to develop a plan for mitigating the adverse impact. The upper Clark Fork
River basin was closed to the issuance of most new surface water rights in 1995. If the State
becomes the new Milltown water right holder, it could use its "consumptive" right as a source for
mitigation.

Formatted: Font: 12 pt

Deleted: ¶

Formatted: No underline

Formatted: Right: -18 pt

Summary

Because of the removal of the dam and power house, the existing Milltown Dam storage and hydropower water rights must be changed or they will be void. Because of the Consent Decree for the Milltown Site, ownership of these rights is most likely to transfer to the State for a new instream use sometime after removal of the dam. This transfer must be accompanied by a water right change authorization.

To receive a change, the State or any new owner of these rights will have to demonstrate two things, first that the change will not adversely affect any existing water right holder and second the amount of water necessary for the new beneficial use. Under existing law, enforcing the new rights would not constitute an adverse effect, and a change authorization would not change the existing December 11, 1904 priority date. Above the Milltown Dam site, 3,938 surface water rights are junior to the of the Milltown rights. The purpose of most of the junior uses is either stock water or irrigation. The new owner of the Milltown rights could enforce the changed rights whenever they are not filled by making calls on junior users. Because the amount of water that would be put to a new beneficial use under the changed right is not known, one cannot predict the frequency of potential calls on junior users. Given the hydrograph of the Clark Fork River above Missoula, calls would be most likely outside of the mid-March through mid-July period. The new owner could also object to changes in upstream water rights or to new water right permits.

However, the right to enforce does not necessarily translate to enforcement. A new owner may opt not to make calls, perhaps in return for a quid quo pro such as a drought plan that manages water to share shortages among some or all of the basin's water users.

The purpose of this paper is not to advocate any position regarding the Milltown Dam water rights. Its purpose is to explain why and how the ultimate disposition of those rights may be of crucial importance to upper Clark Fork basin water users.

23

Appendix 3 BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM)	NOTICE OF PUBLIC HEARING ON
36.12.101, definitions and ARM 36.12.120, basin)	PROPOSED AMENDMENT
closure area exceptions and compliance)	
)	

To: All Concerned Persons

- 1. On September 26, 2007, at 9:00 a.m., the Department of Natural Resources and Conservation will hold a public hearing in the Department of Public Health and Human Services Auditorium, 111 North Sanders, Helena, Montana, to consider the amendment of the above-stated rules.
- 2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on September 14, 2007, to advise us of the nature of the accommodation that you need. Please contact Kim Overcast, Montana Department of Natural Resources and Conservation, 1424 9th Avenue, Helena, MT 59620, telephone (406) 444-6614, fax (406) 444-0533, or e-mail to kovercast@mt.gov.
- 3. The rules as proposed to be amended provide as follows, stricken matter interlined, new matter underlined:
- 36.12.101 DEFINITIONS Unless the context requires otherwise, to aid in the implementation of the Montana Water Use Act and as used in these rules:
 - (1) through (7) remain the same.
- (8) "Augmentation plan" means a plan to provide water to a source of supply and its tributaries to mitigate the depletion effects of a permit or change authorization. The augmentation water right priority date is important to the success of any augmentation plan since call can be made on that water right. Examples of augmentation include, but are not limited to augmenting the source of supply with water from a nontributary source, or retiring all or a portion of senior water rights in the same source of supply in amounts equal to or greater than the depletion effects of the permit or change application.
 - (9) through (32) remain the same but are renumbered (8) through (31).
- (33) "Immediately or directly connected to surface water" means ground water which, when pumped at the flow rate requested in the application and during the proposed period of diversion, induces surface water infiltration.
- (34) "Induced surface water infiltration" means that water being pumped from a ground water source is pulling surface water into the cone of depression.
 - (35) through (39) remain the same but are renumbered (32) through (36).
- (37) "Net depletion" for the purposes of 85-2-360, MCA, means the calculated volume, rate, timing, and location of reductions to surface water resulting from a proposed groundwater appropriation that is not offset by the corresponding accretions to surface water by water that is not consumed and subsequently returned to the surface water.
 - (40) through (50) remain the same but are renumbered (38) through (48).
- (49) "Potentially affected area" means, as referred to in basin closure rules and in the context of a net depletion analysis, the area or estimated area where groundwater will be affected by a proposed project. The identified area is not required to exceed the boundaries of the drainage subdivisions established by the Office of Water Data Coordination, United States Geological Survey, and used by the Water Court, unless the applicant chooses to expand the boundaries.
 - (51) through (79) remain the same but are renumbered (50) through (78).

AUTH: 85-2-370, MCA

IMP: 85-2-360 through 85-2-364, 85-2-368, MCA

36.12.120 BASIN CLOSURE AREA EXCEPTIONS AND COMPLIANCE

- (1) through (5) remain the same.
- (6) Augmentation plans are allowed in basin closure areas. An augmentation plan must mitigate the effects to the surface water source that would be depleted because of a proposed application.
 - (7) Augmentation must occur in the depleted reach and during the season of depletion.
- (8) An augmentation plan must include a measuring plan to ensure that the source being depleted is receiving the benefits of the augmentation.
- (9) If an augmentation plan requires more than one application, all applications will be processed simultaneously. If any of the augmentation applications is terminated or denied, all related applications will be terminated or denied.
- (10) If an augmentation plan includes the filing of a Notice of Completion of Groundwater Development, the water must be from a nontributary source. The Notice of Completion must be filed with the department as soon as the water is used for augmentation.
- (11) In basin closure areas that allow applications for ground water that is not immediately or directly connected to surface water, information must be included in the document required in (2) demonstrating that the application qualifies as a ground water exception.
- (12) The department will not determine an application to be for a permit to appropriate ground water unless the department can determine from the information provided that the cone of depression or zone of influence of a pumping well will not induce surface water infiltration during the proposed period of diversion.
- (13) The department hydrologist shall make a written determination that the evidence submitted by an applicant is sufficient on which to base a determination that the proposed source aquifer is not hydraulically connected or if hydraulically connected to surface water, will not induce surface water infiltration.
- (14) An applicant must address whether the source aquifer is hydraulically connected to any surface water sources that lie within an estimated or actual delineated zone of influence. An applicant may use the results of an appropriate nearby aquifer test to approximate the zone of influence. Depending on circumstances, such as proposed flow rate and volume, cyclic pumping, well depth, or distance to surface water, an applicant may be able to demonstrate that there is not nor will there be a hydraulic connection to surface water when water is pumped at the proposed flow rate during the period of diversion.
- (a) High and low transmissivity and storativity values can be evaluated and used to estimate a zone of influence. The applicant must determine if the source aquifer is hydraulically connected to surface water within the delineated zone of influence.
- (b) Relative or absolute elevations of groundwater levels and beds of surface water sources are needed to evaluate whether a hydraulic connection exists.
- (c) Water level data may be obtained from existing wells located within the zone of influence or at the surface water source.
- (d) If existing wells are not available, the installation of small diameter wells, pits, wellpoints, or piezometers, including those adjacent to or in the surface water source, can be used to determine the existence of a hydraulic connection.
- (e) If an applicant demonstrates that the static groundwater level is greater than 10 feet below the bed of a surface water source, the source aquifer is not considered hydraulically connected to surface water at that location. Further testing for induced surface water infiltration at the tested location is not required.
- (f) If an applicant demonstrates that the static ground water level is less than 10 feet below the bed of a surface water source, additional proof is required to show whether the source aquifer is hydraulically connected to surface water. Additional proof must include an evaluation of capillary pressure, saturation, and unsaturated flow between the bed of the surface water source and the water table, and diurnal and seasonal fluctuations of static water levels. If additional proof is not provided, the source aquifer is considered to be hydraulically connected to surface water at that location. Further testing must be conducted to determine whether pumping the proposed well will induce surface water infiltration during the proposed period of diversion.
- (15) An aquifer test must be conducted using methods described in ARM 36.12.121 that will determine the aquifer properties needed to determine the zone of influence for the period of diversion and the potential for drawdown to induce infiltration of surface water within the zone of influence.

- (a) One or more observation wells may be needed to measure ground water levels between the proposed production well and surface water sources and to determine hydraulic gradients before and during aquifer testing.
- (b) Staff gage(s) must be installed in surface water source(s) adjacent to the observation well(s) to monitor stage(s) during the aquifer test for comparison with ground water level(s).
- (c) Relative or absolute elevations of ground water levels and surface water stages must be compared to determine whether the hydraulic gradient between the source aquifer and gaining surface water sources is reversed or whether the hydraulic gradient between losing surface water sources and the source aquifer is steepened. The occurrence of either during the aquifer test constitutes induced surface water infiltration.
- (d) To evaluate whether induced surface water infiltration will occur during the period of diversion, an applicant must project drawdown to the surface water sources for the period of diversion using aquifer properties determined from the aquifer test. Analytical equations, an analytical ground water flow model, or a numerical ground water flow model may be used to evaluate whether induced surface water infiltration will occur.
- (e) An applicant must evaluate whether a surface water body or reach is losing or gaining to evaluate whether a proposed well will induce surface water infiltration.
- (i) If the applicant projects that drawdown will reach a losing surface water source that is hydraulically connected to groundwater during the period of diversion, the department will determine that pumping the proposed well will induce surface water infiltration.
- (ii) For gaining surface water sources, the hydraulic gradient must be compared with the slope of the cone of depression that would be created during the period of diversion. If the comparison shows that the slope of the cone of depression is greater than the hydraulic gradient, the department will determine that pumping the proposed well will induce surface water infiltration.
- (16) For groundwater pits, the department will determine that evaporation losses do not induce surface water. If water is being pumped from the pit, then a hydraulic analysis is required to determine if pumping will induce surface water infiltration.
- (6) A net depletion analysis must include hydrogeologic data or a model developed by a hydrogeologist, a qualified scientist, or a qualified licensed professional engineer.
- (a) The net depletion analysis must include but is not limited to analysis of the following factors within the potentially affected area:
- (i) The degree of hydraulic connection between the source aquifer and all potentially affected surface water. Surface water means, in addition to ARM 36.12.101(63) and for the purposes of 85-2-360 through 85-2-362, MCA, includes but is not limited to rivers, streams, irrigation canals, or drains.
 - (ii) The average monthly flow rate and volume of water consumed for a proposed project.
- (iii) Propagation of drawdown from a well or other groundwater diversion and rate, timing, and location of any resulting surface water depletion effects.
- (iv) The volume, rate, timing, and locations of accretions to surface water by water that is not consumed and is subsequently returned to surface water.
- (b) The determination of the degree of hydraulic connection between a source aquifer and surface water within the potentially affected area must include an analysis of geology and static groundwater elevations relative to the elevation of surface water beds. Such analysis must include:
- (i) Groundwater boundaries identified by the applicant for the potentially affected area. The identified area does not need to extend beyond the boundaries of the water right basins used by the department and established by the Office of Water Data Coordination, United States Geological Survey and used by the Water Court, unless the applicant chooses to expand the boundaries. The following information must be included with the application to establish the location of the aquifer boundaries:
 - (A) a description of how the potentially affected area was delineated;
 - (B) geologic maps (including stratigraphy and structure), well-log data, and aquifer testing;
- (C) the extent (vertical and lateral) and properties of a source aquifer (hydraulic conductivity, transmissivity, storage coefficient, flow direction, rate of movement, and water availability) and any confining layers; and
 - (D) the presence of any faults, all relative to the locations of potentially affected surface water.
- (ii) Evidence and supporting information of the degree of hydraulic connection between the source aquifer and surface water sources located within the potentially affected area, including but not limited to rivers, springs, creeks, streams, reservoirs, lakes, irrigation canals, or drains that may or may not show a net depletion. The assessment may include, but is not limited to the following:
 - (A) map showing locations of potentially affected surface water;
 - (B) the distance between the proposed points of diversion and potentially affected surface water;
 - (C) geologic map from United States Geological Survey or Montana Bureau of Mines and Geology of the

potentially affected area;

- (D) using existing test and production well logs, cross-section(s) showing source aquifer and any confining layers;
 - (E) aquifer test results and interpretation of those results;
- (F) locations where bedrock aquifers outcrop beneath surface water and where alluvial aquifers exist in the potentially affected area;
- (G) relevant stream-flow data from United States Geological Survey or other published source for rivers, springs, creeks, streams, reservoirs, lakes, irrigation canals, or drains within the potentially affected area;
- (H) relative elevations of groundwater and surface water beds in the potentially affected area, as determined by measuring static water levels in wells that have been surveyed relative to surface water bed elevations;
 - (I) hydrographs of groundwater levels and surface water flows in the area of potential effect;
 - (J) monitored groundwater levels and measured surface water gains and losses; and
- (K) any surface water measurements that have been made by the applicant, or another, including but not limited to canal, drain, water commissioner, or other stream gauging records.
 - (iii) Existing water rights an applicant must provide the following information:
- (A) a list and map of the points of diversion of surface water appropriation rights, including but not limited to rivers, springs, creeks, streams, reservoirs, lakes, irrigation canals, or drains located within the potentially affected area; and
- (B) a list and map of the points of diversion of groundwater rights on record with the department that are located within the potentially affected area.
- (c) The flow rate diverted and the volume of water consumed by a proposed project must include an analysis of:
- (i) the flow rate and period of diversion of water actually diverted for the proposed project as compared to that diverted for like beneficial uses; and
- (ii) estimates of the volume consumed by evaporation, plant transpiration (evapotranspiration), interception losses, depression storage losses, and all other forms of consumption associated with the proposed project. Interception losses include that portion of precipitation which wets and adheres to surface objects, such as vegetation and other cover, and is returned to the atmosphere through evaporation. Depression storage losses include that portion of precipitation that is trapped in small surface depressions and returned to the atmosphere through evaporation:
- (A) consumed water calculation the following methods may be used to determine the rate and volume of water consumed by the proposed project:
- (I) for irrigation or lawn and garden use, the potential evapotranspiration losses via measurements or computations using a method that is scientifically defensible;
 - (II) household consumption estimates from generally accepted published data and guidelines; and
- (III) wastewater treatment estimates considering evaporation rates from lagoons and evapotranspiration rates from disposal beds or flow measurements from similar existing systems.
- (d) An analysis of the drawdown must include the volume, rate, timing, and location of any resulting surface water depletion effects, within the potentially affected area caused by pumping the proposed well or other groundwater diversion, including at a minimum, but is not limited to the following:
 - (i) the distance between a well and any potentially affected surface water;
 - (ii) depth of a well;
 - (iii) aquifer properties from aquifer tests, existing data, or other previous studies;
 - (iv) the location of all wells or other sources of groundwater of record within the potentially affected area;
 - (v) the degree of connection between the surface water and the source aquifer to the proposed well;
 - (vi) pumping schedule for the proposed project;
 - (vii) confining layer properties from source aquifer testing; and
 - (viii) location and type of source aquifer boundaries.
- (e) An evaluation of potential return flows to a source aquifer or surface water source within the potentially affected area must be included and must identify the volume, rate, timing, and location of return flows.
- (i) In addition to ARM 36.12.101(57) and for the purposes of 85-2-361, MCA, return flows includes but is not limited to any treated wastewater if the treated wastewater will be used as part of an aquifer recharge plan.
- (f) Drawdown from a well and the volume, rate, timing, and location of any resulting gross surface water depletion which depends on:
 - (i) the distance between a well and surface water;
 - (ii) the depth of the well:
 - (iii) aquifer properties;

- (iv) location of aquifer boundaries; and
- (v) the degree of hydraulic connection between surface water and the source aquifer to the well.
- (g) A water balance table must be included that describes the monthly and total annual water balance for the proposal. It must include an accounting of the following:
 - (i) the volume of water that would be diverted;
 - (ii) the volume of water that would be consumed;
 - (iii) the volume of water that would return to an aquifer and to surface water; and
- (iv) the volume of net depletion to surface water, including but not limited to rivers, springs, creeks, streams, reservoirs, lakes, irrigation canals, or drains.
- (h) Information required by the hydrogeologic assessment may not be sufficient to meet applicable criteria under 85-2-311, MCA, including but not limited to adverse effect to a prior appropriator. The applicant for a beneficial water use permit pursuant to 85-2-311, MCA, is responsible for providing sufficient evidence to meet all applicable criteria.

AUTH: 85-2-370, MCA

IMP: 85-2-360 through 85-2-364, 85-2-368, MCA

REASONABLE NECESSITY: House Bill 831, passed by Montana's 60th Legislature, and effective on May 3, 2007, revised water laws in basin closure areas. These rules clarify the sections of HB 831 pertaining to net depletion and remove current sections made obsolete by the new statute. The rules are needed to ensure that both the department and water right applicants understand the definitions of and the requirements for applications affected by the new statute.

- 4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted in writing to Kim Overcast, Department of Natural Resources and Conservation, 1424 9th Avenue, Helena, MT 59620; fax (406) 444-5918; or e-mail kovercast@mt.gov, and must be postmarked no later than September 26, 2007.
- 5. Kim Overcast, Department of Natural Resources and Conservation, has been designated to preside over and conduct the hearing.
- 6. An electronic copy of this Notice of Public Hearing on Proposed Amendment is available through the department's site on the World Wide Web at http://www.dnrc.mt.gov. The department strives to make the electronic copy of this Notice of Public Hearing on Proposed Amendment conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered.
- 7. The agency maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding conservation districts and resource development, forestry, oil and gas conservation, trust land management, water resources, or combination thereof. Such written request may be mailed or delivered to Legal Unit, Department of Natural Resources and Conservation, 1625 11th Avenue, Helena, MT 59620, faxed to the office at (406) 444-2684, or may be made by completing a request form at any rules hearing held by the agency.
- 8. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled. The bill sponsor was notified by regular mail on July 20, 2007.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

/s/ Mary Sexton
MARY SEXTON
Director Rule Reviewer
Natural Resources and Conservation

/s/ Anne Yates ANNE YATES

Certified to the Secretary of State on August 13, 2007.

Appendix 4

BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA

In the matter of the proposed amendment of)	NOTICE OF PUBLIC HEARING ON
ARM 36.12.101, definitions and ARM 36.12.107,)	PROPOSED AMENDMENT AND
filing fee refunds and the adoption of New Rule)	ADOPTION
I, objection to application)	
)	

To: All Concerned Persons

- 1. On November 5, 2007, at 9:00 a.m., the Department of Natural Resources and Conservation will hold a public hearing in the Department of Public Health and Human Services Auditorium, 111 North Sanders, Helena, Montana, to consider the proposed amendment and adoption of the above-stated rules.
- 2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on October 12, 2007, to advise us of the nature of the accommodation that you need. Please contact Kim Overcast, Montana Department of Natural Resources and Conservation, 1424 9th Avenue, Helena, MT 59620, telephone (406) 444-6614, fax (406) 444-5918, or e-mail to kovercast@mt.gov.
 - 3. The rules as proposed to be amended provide as follows, stricken matter interlined, new matter underlined:
- <u>36.12.101 DEFINITIONS</u> Unless the context requires otherwise, to aid in the implementation of the Montana Water Use Act and as used in these rules:
 - (1) through (4) remain the same.
- (5) "Application" for purposes of ARM 36.12.120 through 36.12.122, 36.12.1301, 36.12.1401, 36.12.1501, and 36.12.1601 means an application for beneficial water use permit, Form No. 600, including criteria addendum form No. 600A, 600B, or 600ACF, or application to change a water right, Form No. 606, including criteria addendum Form No. 606A, 606B, 606ASW, or 606T.
- (a) For the purposes of New Rule I, "application" means an application filed under 85-2-302, 85-2-316, 85-2-407, and 85-2-408, MCA.
 - (6) through (46) remain the same.
 - (47) remains the same but is renumbered (48).
 - (48) remains the same but is renumbered (49).
 - (49) remains the same but is renumbered (47).
 - (50) through (79) remain the same.

AUTH: 85-2-308, MCA IMP: 85-2-308, MCA

36.12.107 FILING FEE REFUNDS

- (1) through (4) remain the same.
- (5) If an applicant inadvertently files the wrong form, the applicant may apply the fee paid to the fee required for the correct form, pay the difference due, or be entitled to a refund; if overpayment is made.
- (6) If a water right application is withdrawn within 30 days after the objection deadline, the Objection to Application filing fee will be refunded.
- (7) A refund of the Objection to Application filing fee will not be authorized if an objector does not correct the deficiencies identified in the Objection Deficiency Notice by the deadline specified in the notice.
- (8) With the exception of ARM 36.12.107(6), a refund of the Objection to Application filing fee will not be authorized.

AUTH: 85-2-302, MCA IMP: 85-2-302, MCA

<u>REASONABLE NECESSITY</u>: The amendments are necessary to update definitions and to clearly set forth when a refund of filing fees will be authorized.

4. The rule proposed to be adopted provides as follows:

NEW RULE I OBJECTION TO APPLICATION (1) A person objecting to a proposed application under 85-2-308, MCA, must file an objection to an application on Form No. 611, Objection to Application, which can be obtained from the department, and must comply with the requirements set forth in this rule.

- (2) A separate Objection to Application must be filed for each water right application.
- (3) Persons owning separate water rights must each file their own Objection to Application form. For example, if person A owns a water right and B owns a different water right and both want to file an objection to the same application, owner A and owner B must each file separate objections.
- (4) Co-owners (owners of a water right that is not split between the owners) of an undivided water right may file one Objection to Application form.
- (5) Only a person whose signature appears on a valid Objection to Application will be allowed to participate in an administrative hearing. An entity filing objections must be represented by legal counsel in any administrative hearing before the department. One co-owner cannot represent another co-owner (see unauthorized practice of law 37-61-201, MCA).
- (6) All corporations, limited liability companies, trusts, partnerships, associations, and groups of individuals (unless each person appears pro se) must be represented by an attorney licensed to practice in the state of Montana in order to participate in a formal proceeding before the department, including but not limited to a contested-case proceeding. This list is not exhaustive (see 37-61-201, MCA). Failure to retain required legal representation will result in dismissal of the Objection to Application.
- (7) An Objection to Application is timely if the postmark date on the form is on or before the objection deadline stated in the public notice of the application.
- (8) An Objection to Application filed with the department before an application has been published will not be accepted and will be returned.
- (9) Upon receipt of an Objection to Application or response to an Objection Deficiency Notice, the department will place the envelope postmark date on the form. If the postmark date is not legible, the department will assign the date as two days prior to the department's receipt of the objection form. An objector is solely responsible for ensuring timeliness, a legible postmark, and filing of the objections.
 - (10) Fax or electronic mail (e-mail) submissions of the Objection to Application will not be accepted.
 - (11) An Objection to Application is correct and complete if it includes the following legible information:
 - (a) filing fee;
 - (b) objector's name and mailing address;
 - (c) name of the water right applicant;
 - (d) water right application number;
- (e) if an objector is claiming the objector's water right will be adversely affected if the application were granted, the objector must provide the objector's department-assigned water right number. If the water right was exempt from the statewide water right filing requirements and is not on record with the department, the objector must provide the following information:
 - (i) date of first use;
 - (ii) name of the appropriator;
 - (iii) source;
 - (iv) type of use (stock or domestic);
 - (v) the flow rate and volume of water used;
 - (vi) the point of diversion; and
- (f) facts indicating that the application does not meet one or more of the applicable criteria set forth in 85-2-302, 85-2-311, 85-2-316, 85-2-402, 85-2-407, or 85-2-408, MCA. The facts provided must specifically describe why or how one or more of the criteria are not met;
- (g) facts explaining how the objector has standing to object. To have standing, an objector must have property, water rights, or other interests that would be adversely affected were the application granted. The objection must describe how the objector's property, water rights, or interests will be adversely affected if the water right application were granted; and
- (h) notarized signature of the objector or the objector's legal representative. If a representative of the objector other than objector's attorney signs the Objection to Application affidavit, the representative shall state the relationship of the representative to the objector on the form and provide documentation demonstrating the authenticity of that relationship, such as a copy of a power of attorney.
- (12) An objection that is deemed correct and complete and valid pursuant to 85-2-308(3) and (6), MCA, may proceed to an administrative hearing. The administrative hearing will be limited to the criteria objected to in the objection. An objector may participate in the administrative hearing only on the criteria to which the objector specifically objected and which is determined valid by the department.
- (13) The department will mail notice to the objector of any deficiencies in the objection. The information requested in the Objection Deficiency Notice must be postmarked or hand delivered to the department within 15

days from the date on the Objection Deficiency Notice.

- (14) If the objector does not correct the deficiencies as determined by the department by the deadline, the objection will be terminated without further notice.
 - (15) The department will document a valid objection by completing an objection validity form.
 - (16) The department will determine on which criteria the objector has filed a valid objection.
- (17) An objection may be withdrawn at any time in writing. A party withdrawing an objection will not be considered a party by the department to any hearing that may be held by the department.
- (18) An applicant is not required to meet a water quality criterion when a valid water quality objection is not raised or is withdrawn.
- (19) Private agreements between applicants and objectors which provide for the withdrawal of objections and include conditions that must be met by an applicant or objector may not be recognized by the department or included in a granted application. The department will only place a condition on a granted application if the department determines the condition is necessary to meet the application criteria.

AUTH: 85-2-308, MCA IMP: 85-2-308, MCA

<u>REASONABLE NECESSITY</u>: This rule is necessary to delineate the components of a correct and complete objection for both applicants and objectors and is required by 85-2-308(5), MCA. The rules also help to ensure that applicants, objectors, and the department understand how receipt of objections to applications will be administered.

- 5. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted in writing to Kim Overcast, Department of Natural Resources and Conservation, 1424 9th Avenue, Helena, MT 59620; fax (406) 444-5918; or e-mail kovercast@mt.gov, and must be postmarked no later than November 5, 2007.
- 6. Jan Langel, Department of Natural Resources and Conservation, has been designated to preside over and conduct the hearing.
- 7. An electronic copy of this Notice of Proposed Amendment is available through the department's site on the World Wide Web at http://www.dnrc.mt.gov. The department strives to make the electronic copy of this Notice of Public Hearing on Proposed Amendment and Adoption conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered.
- 8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding conservation districts and resource development, forestry, oil and gas conservation, trust land management, water resources, or a combination thereof. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be sent or delivered to the contact person in (5) above or may be made by completing a request form at any rules hearing held by the department.
- 9. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled. The bill sponsor was notified by regular mail on July 20, 2007.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

/s/ Mary Sexton/s/ Anne YatesMARY SEXTONANNE YATESDirectorRule Reviewer

Natural Resources and Conservation

Certified to the Secretary of State September 24, 2007.